IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 1168 OF 2004

Suresh Anantrao Patki
(since deceased by his legal heirs)
Smt. Sumitra Suresh Patki & ors. ... Appellants

V/s

Smt. Mandala Dattatraya Mundale ... respondent

Shri V.B. Rajure for the appellant.

Shri S.M. Kamble for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 11TH OCT., 2004.

P.C.:

1. The appellant-defendant has preferred this appeal against the judgment and order dated 23.7.2004 passed by the Addl. District Judge, Kolhapur dismissing the appeal and confirming the order passing the decree of possession passed by the Civil Judge, Sr.Divn., Kolhapur dated 10.8.1999.

2. I have heard the learned counsel for the appellant as well as respondent. Perused the available record and the judgments of both Courts below.

The respondent plaintiff has filed the suit for recovery of possession of the suit property. The subject matter of the dispute is City Survey No.1171 admeasuring 40.8 sq.mtrs. situated in Ward "B" of Kolhapur City. The said property originally belongs to one Narayan Vithal Bhatwadekar who died on 11.7.1994. He was unmarried. Plaintiff is the daughter of one Sumati Nawathe who was the daughter of sister of said Narayan Bhatwadekar. Defendant Nos. 1 and 2 are the sons of another daughter of sister of Narayan Bhatwadekar. The maternal uncle of the defendants Ramchandra Narayan Desai was also residing alongwith plaintiff and defendants in the said suit house with permission of Narayan Bhatwadekar. The plaintiff was brought up by Narayan as his real daughter. He also performed her marriage. However, the marraige was broken within a short period and hence he returned to Kolhapur and started to reside with Narayan alongwith her son since 1955. She was residing on the ground floor. She was looking after Narayan during the period of his illness. Plaintiff’s son was also helping him for this purpose. As a token of gratitude, Narayan bequeathed the suit property under a will dated 24.6.1992, at the time of preparation of will he was examined by the doctor. His mental and physical condition was sound. After the death of Narayan,

plaintiff got entered her name in City Survey record with respect fo the City Survey No. 1171-"B" Ward, Kolhapur. During the life time of Narayan, he allowed defendants and their mother Sharayu Patki to reside on the upper floor without accepting any consideration. Defendants were aware about the will deed executed by Narayan, however, they have not delivered the possession of the suit property inspite of plaintiff’s request and, therefore, ultimately the suit came to be filed.

3. The defendants challenged the suit on the ground that the will was not proved in law and in fact, according to them, Narayan’s physical and mental condition was not sound at the time of his death at the age of 87 years. On such and other grounds, the suit was sought to be dismissed with no order as to costs.

The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had proved that the suit property was legally and validly bequeathed to her by executing a will deed dated 24.6.1992. It was also held to be proved that the will was legal and valid and, as such, the plaintiff was owner of the suit property. It was further held that the defendants were gratituous licensee of the suit

property and, therefore, their licence was duly proved and consequently the suit came to be decreed by the direction to the defendants that they should vacate the suit premises within two months from the date of the decree.

4. The appeal was carried to the District Court, Kolhapur. The learned Addl. District Judge, after hearing both parties on merits, came to the conclusion that the learned Trial Judge has appreciated the entire evidence properly and, as such, no interference was necessary and consequently the appeal came to be dismissed with costs. Hence the present appeal.

5. At the outset, it may be noted that the only so called question of law sought to be raised is to the effect that the lower Court has not properly interpreted the provision of Sec.63 of the Indian Succession Act while recording the finding that the will deed was genuine and fulfilling requirements as contemplated therein.

In this regard, I have critically perused the entire evidence on record and it must be noted that the lower appellate Court has observed that the compliance of

attestion under Sec. 63 of the Indian Succession Act was proved as Scribe Joshi as well as attesting witness Gabale, being testified to that effect. Another witness Shinglikar put his signature on the will deed and thereafter the Scribe Joshi has also signed it. After putting the signature by testator Bhatwadekar, Dr. Birdi had asked the testator to sign before him and therefore he gave certificate of fitness of the will deed. In the circumstances, the lower appellate Court Judge came to the conclusion that the requirement under Sec.63 of the Act was fulfilled and hence there was no reason to doubt the same. Similarly, on the basis of available evidence on record, both the Courts below have negatived the contention of the defendant that the will was executed on the suspicious circumstances. It is apparent from the record that defendants failed to defend, much less proved what were the circumstances especially in view of oral evidence led on behalf of the plaintiff to establish the will deed which is held to be valid. Therefore, i have no doubt whatsoever that both the Courts below had properly appreciated the evidence on record and have correctly recorded the findings on issues of facts as well as law in proper manner.

6. In the case of **Kondiba Dagadu Kadam v/s Savitribai**

Sopan Gujar, reported 1999 SCC 2213, the Apex Court has observed that the conditions mentioned in Sec.100 of C.P.C. must be strictly fulfilled before a second appeal can be maintained and no Court has the power to add to or enlarge those grounds. The second appeal cannot be decided merely on equitable grounds. The concurrent findings of whatsoever nature, cannot be disturbed by the High Court in exercise of bar under Sec.100 of the C.P.C. In a case wherefrom given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible.

In view of this position and taking into account the fact that both the Courts below have appreciated the legal position contemplated under Sec. 63 of the Indian Succession Act correctly and properly, I do not see any reason to interfere with the findings recorded by the lower Appellate court.

In the result, the appeal stands dismissed in limine with no order as to costs.

Consequently, the civil application also stands

dismissed with no order as to costs.

.....